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PRESS STATEMENT OF FCC COMMISSIONER GLORIA TRISTANI

Re: Enforcement Bureau Letter Ruling on WRLR (FM), Homewood, Alabama Indecency Complaint

The FCC Enforcement Bureau has issued a letter dismissing an indecency complaint filed by Angela F. Woods of Hueytown, Alabama. Ms. Woods' complaint against WRLR FM arose from words uttered during the "Lex and Terry" show and the radio personalities' on-air conduct after she phoned in her complaint.[1] First, Ms. Woods reported the broadcast of the word "pussy" which she described as "foul" and "obscene." She also recited the date, the early morning time, the station's call letters and the title of the show. She expressed her distress at use of such language on a station with a "young audience." But the alleged misconduct apparently did not stop there. According to Ms. Woods, after receiving her phone call complaint the radio personalities verbally attacked her on the air. They referred to her as a "bitch" and that she needed a "stick up her ass." After she arrived at work, her coworkers were listening to the same station and she heard the on-air personalities say they "hope she has a wreck and gets killed on the way to work."[2]

The Bureau dismissed the complaint noting the series of remarks were "certainly offensive, but are not indecent because they are not patently offensive as measured by contemporary community standards for the broadcast medium."[3] Based on the record before us, I cannot agree. First, Ms. Woods made a *prima facie* case for indecency sufficient to survive dismissal. Second, a broadcaster owes a duty to handle indecency complaints from citizens without engaging in over-the-air verbal attacks that include expressing a desire for the complainant to wreck her car and die.

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[1] *See Letter Complaint.*
[2] *See Letter Complaint.*
[3] *See Bureau Letter Dismissing Complaint at ¶2.*

A. Applicable Law

The statute the FCC enforces provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both. [4]

This Commission has defined indecency as:

> [l]anguage or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[5]

Among the factors that the Commission examines to determine whether material is patently offensive include the actual words or depictions in context to see if they are, for example, "vulgar" or "shocking," and whether the material is dwelled upon or is isolated and fleeting.[6] The Supreme Court has pointed out that what is "patently offensive":

> [D]epends on context (the kind of program on which it appears), degree (not "an occasional expletive"), and time of broadcast (a "pig" is offensive in "the parlor" but not the "barnyard").[7]

Thus, the context question focuses in the first instance on the "type" of program. The "degree" of offensiveness requires the remarks be distinguished from an "occasional" expletive and the time of day is referenced primarily to draw attention to the fact that children may be listening.

Applying these objective standards to the facts alleged by Ms. Woods demonstrates: 1) the "type" of program was a regularly scheduled morning radio program obviously targeting listeners traveling to their morning destinations and was not an adult only program; 2) a vulgar reference to female genitalia was followed by a series of remarks that included *a deliberate and unambiguous reference to the listener's excretory organ and violent penetration thereof by a foreign object*; and, 3) the broadcast was made during the normal hours children are riding in

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[4] *See* 18 U.S.C. § 1464; Communications Act, § 503(b)(1)(D); The FCC may impose civil penalties because the statutes authorizing civil penalties incorporate § 1464, a criminal statute. *See* 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E) (1970 Supp. V).

[5] *See Enforcement of Prohibitions Against Broadcast Indecency*, 8 FCC Rcd 704, n. 10 (1993). The Commission's jurisprudence does not indicate whether the "patently offensive" and "indecent" determinations should be made with respect to the broadcast community's vision of what is necessary to protect minors or the sensibilities of the broadcast community as an adult whole.

[6] *See, e.g., Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 931-32 (1987), *aff'd in part, vacated in part on other grounds, remanded sub nom. Act I*, 852 F.2d 1332 (D.C. Cir. 1988).

[7] *FCC v. Pacifica*, 438 U.S.726, 748 (1978).

cars on their way to school and adults are on their way to work. These remarks were followed by a hope that Ms. Woods was killed on her way to work.

The foregoing establishes that the series of remarks were not unrelated, targeted Ms. Woods personally, and thus should not be construed as "isolated," "fleeting" or "occasional." The timeline in Ms. Woods' complaint suggests the radio personalities deliberated prior to calling her a "bitch" and making the "stick up her ass" comment. These allegations state a *prima facie* case for indecency under the statute and our cases.

1. *The Personal Attack on Ms. Woods*

I now turn to the alleged on-the-air, personal attack on Ms. Woods that amounted to a public wish that she be killed on her way to work. While I acknowledge this personal attack does not fall readily within the definition of "indecent," I note its utter impropriety and write to distinguish it from legitimate political speech that is surely entitled to protection. I also note my belief that no broadcast license is awarded with the intent that it will become the vehicle for personal attacks on its listeners merely because they raise statutory compliance issues.

First, demeaning personal attacks possess little political value. Like "fighting words," their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said:

> [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[8]

While one may register a public protest by placing a vulgar message on his jacket and, in so doing, expose unwilling viewers,[9] that does not mean that a broadcaster has an unqualified constitutional right to verbally attack a complaining listener. While the broadcaster speech at issue here may be protected, it surely lies at the periphery of First Amendment concern.

Second, a special factor recognized by the U.S. Supreme Court as justifying regulation of the broadcast media was its "invasive" nature.[10] Whatever proper limits exist on this agency's power to restrict a broadcaster from "following" an unwilling listener, I cannot sit mute while legitimate citizen concerns are dismissed with vulgar and profane attacks. Permitting its employees to exploit the invasive nature of the broadcast medium to stalk or shadow its listeners in this manner is misconduct, if not actionable misconduct.[11]

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[8] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).
[9] *See Cohen v. California*, 403 U.S. 15, 21-22 (1971).
[10] *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).
[11] *See e.g. International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 684 (1992) (finding that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation").

Finally, I point out that my concerns are shared by the Alabama legislature. The State of Alabama has established the misdemeanor crime of "Harassing Communications" which provides:

> A person commits the crime of harassing communications if, with intent to harass or alarm another person, he or she does any of the following:
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> a. Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written or electronic communication, in a manner likely to harass or cause alarm.[12]

While it does not appear Alabama has had the sad occasion to consider this statute in the context of a radio broadcast, it cannot be overlooked that the broadcaster's alleged over-the-air attack on Ms. Woods was deliberate, calculated to offend and did in fact cause alarm. Her letter to this agency should be taken as ample indication that she was alarmed. We should be as well.

B. Dismissal is Improper on the Facts of this Case

The Bureau found Ms. Wood's complaint described "offensive" but not "patently offensive" language and without any further effort, concluded dismissal was proper. As I stated above, Ms. Woods' allegations included described a vulgarity ("pussy"), a second vulgarity ("bitch"), an patently offensive remark ("stick up her ass") and a demeaning and personal attack ("hope she has a wreck and gets killed on the way to work").[13] In dismissing her complaint our Bureau read the facts alleged in her complaint in the light most favorable to *the broadcaster rather than the complainant.* This conflicts with well settled principles of civil law where dismissal of civil complaints is permissible only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[14]

Dismissal without even attempting to ascertain from the broadcaster (perhaps the only party in possession of the necessary facts) whether the elements of an indecent broadcast were present is unfair, particularly given the *prima facie* case for a statutory violation described in Ms. Woods' letter. Moreover, it is difficult to discern what more specific allegations are necessary to state a *prima facie* violation under the statute. It may be that constitutional precepts ultimately require such facts be proved prior to imposition of a penalty, but it does not require such proof at the outset of a proceeding. The Bureau's apparent expansion of what is necessary to state a violation under the statute is improper.

Ms. Woods established a *prima facie* case for indecency because the alleged remarks, taken together, void any reliance on the rule that "occasional" indecent remarks violate nothing.

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[12] *See Alabama Code, 1975 § 13A-11-8.*
[13] *See Complaint Letter.*
[14] *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) (discussing Federal Rule of Civil Procedure 12(b)(6)).

It seems the Bureau broke up a single harassing episode into two vulgar remarks, a single, patently offensive remark and a demeaning, personal attack to avoid finding an actionable complaint let alone a violation. Unfortunately, this Commission has erected so many barriers to complaints from the public that our indecency enforcement program is rendered ineffective, as this case demonstrates. Its time for the Commission to begin taking indecency cases seriously again.

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